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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-743

LOCTITE CORPORATION, *Petitioner,*

v.

BROADVIEW CHEMICAL CORPORATION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

WALTER D. AMES
JAMES H. MARSH, JR.
Attorneys for Petitioner,
Loctite Corporation
WATSON, COLE, GRINDLE & WATSON
815 Fifteenth Street, N.W.
Washington, D. C. 20005

Of Counsel:

J. RODNEY RECK

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TABLE OF CONTENTS

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented for Review	2
Constitutional and Statutory Provisions Involved	3
Statement of the Case	3
1. The Immediate Facts	3
2. Background of the Petition	6
Reasons for Granting the Writ	7
1. The decision of the Court of Appeals is in direct conflict with the decision of this Court in *Golden* v. *Zwickler* and with the Court of Appeals for the Ninth Circuit that has followed *Golden* v. *Zwickler*	7
2. The decision of the Court of Appeals is directly violative of Loctite's right to due process of law	8
Conclusion	10

TABLE OF AUTHORITIES

CASES:

Boddie v. Connecticut, 401 U.S. 371 (1971)	9
Broadview Chemical Corporation 1. Loctite Corporation, 406 F.2d 538 (2d Cir. 1969), *cert. denied,* 394 U.S. 967 (1969)	6
Broadview Chemical Corporation v. Loctite Corporation, 162 U.S.P.Q. 366 (D. Conn. 1969), *rev'd,* 417 F.2d 998 (2d Cir. 1969), *cert. denied,* 397 U.S. 1064 (1970)	6
Galpin v. Page, 18 Wall. 350 (1873)	9
Goldberg v. Kelly, 397 U.S. 254 (1970)	9
Golden v. Zwickler, 394 U.S. 103 (1969)	2, 5, 7, 8, 10
Sellers v. Regents of University of California, 432 F.2d 492 (9th Cir. 1970)	8
Trustees of Dartmouth College v. Woodward, 4 Wheat. 518 (1819)	9

Page

STATUTES AND CONSTITUTIONAL PROVISIONS:

Constitution of the United States, Amendment 5 3

U.S. Code, Title 28, § 1254(1) 2

U.S. Code, Title 28, § 2201 ..... 3, 6

U.S. Code, Title 28, § 2202 ..... 3, 6

INDEX TO APPENDIX

The Court of Appeals Judgment 1a

The District Court Opinion and Order 2a

Amended Complaint 4a

Letter of 2/17/67—Robert H. Krieble to Loctite Distributors 9a

Ruling on Defendant's Motion To Dismiss Amended Complaint 11a

Notice of Taking Depositions 13a

Oral Decision Excerpted from Transcript of Proceedings—1/25/71 ..... 14a

Court of Appeals Decision Denying Motion To Dismiss Appeal for Lack of Jurisdiction 14a

Court of Appeals Decision Denying Petition for Rehearing 15a

Court of Appeals Decision Denying Petition for Rehearing en Banc 16a

Court of Appeals Decision Denying Motion To Recall Mandate and Stay Its Reissuance 16a

Court of Appeals Decision Denying Stay of Execution of Mandate 17a

Decision on Form of Injunction (Civil Action No. 10,713) 18a

IN THE

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No.

LOCTITE CORPORATION, *Petitioner,*

v.

BROADVIEW CHEMICAL CORPORATION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Loctite Corporation, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, in its cause numbered 71-1441 entered on September 16, 1971. That judgment affirmed an order of the district court challenged on the basis that the district court lacked jurisdiction over the subject matter of the action.

OPINIONS BELOW

The Judgment of the United States Court of Appeals is unreported and consists of a mere form in which affirmance is indicated by typing. No opinion was rendered. It is printed in the appendix to this petition commencing at page 1a. The order affirmed is dated March 24, 1971, and is printed at 2a to 4a.

JURISDICTION

The Judgment of the Court of Appeals from which the present appeal is taken is dated September 16, 1971. Timely petitions for rehearing and rehearing en banc were denied on October 13, 1971. (15a to 16a). Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Was there a denial of due process of law to petitioner-defendant in this declaratory judgment action, where petitioners, claiming lack of jurisdiction because no actual controversy exists between the parties, was denied a hearing, oral or otherwise, on that issue and further denied the right to discovery in preparation for such hearing?

2. Was the lower court judgment in conflict with *Golden* v. *Zwickler*, 394 U.S. 103 (1969) in denying petitioner a hearing on the existence of an actual controversy at the time of the hearing?

It is submitted that these questions are clearly answered in the affirmative.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional provision involved is Amendment 5, which reads in pertinent part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

The statutory provision involved is 28 United States Code §§ 2201 and 2202, as follows:

> § 2201. Creation of remedy
>
> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.
>
> § 2202. Further relief
>
> Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

STATEMENT OF THE CASE

1. The Immediate Facts.

The present petition is the culmination of a series of declaratory judgment actions brought by respondent, Broadview Chemical Corporation, against petitioner, Loctite Corporation. The first such action was instituted by Broadview on June 1, 1964, seeking an order

declaring that several of Loctite's patents were invalid and noninfringed by certain Broadview compositions that function as anaerobic sealants.[1]

To immediately focus on the facts necessary to a determination of this petition, on May 11, 1970 respondent, unsatiated by six years of litigation, filed a so-called amended complaint (4a to 8a), which Loctite moved to dismiss for lack of an actual controversy as to the compositions identified therein by the designation, Manaka. The District Court denied that motion in a Ruling on Defendant's Motion to Dismiss Amended Complaint (11a to 13a), although it did rule that "[t]echnically, therefore, the new complaint must be considered supplemental rather than amendatory". (11a) The only averment in the "amended" complaint in support of an actual controversy was a letter of February 17, 1967. (9a) Broadview then changed its Manaka compositions but, on November 13, 1970, an Order of the District Court held that those Manaka II compositions could be substituted for the Manaka I compositions and so, on that date, the Manaka II compositions officially entered the case.

Loctite attempted to show that, on November 23, 1970 and thereafter, no actual controversy existed between the parties, any threat contained in the letter of February 17, 1967 having long since been dissipated. Loctite sought to do so by noticing the deposition of several Broadview customers, exemplary of which is the notice of taking deposition of Fred Jenkins on

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[1] Anaerobic sealants are compositions in liquid form which, when deprived of oxygen, polymerize or harden. An understanding of the precise mechanism by which they function is not necessary to the issues on this petition.

January 12, 1971 (13a), to show that, whatever the effect of the letter of February 17, 1967, there was no threat in the minds of Broadview's customers on November 13, 1970, or the subsequent hearing at which Loctite would present evidence of lack of controversy. In an oral decision rendered January 25, 1971 (14a), the District Court effectively struck the notices of taking depositions by granting Broadview's motion for a protective order and denying Loctite the right to take discovery of Broadview's customers and prospective customers, i.e., those who possibly could have obtained the letter of February 17, 1967. The District Court thus effectively barred Loctite from any hearing, either oral or on papers, by preventing Loctite from obtaining evidence to present at the hearing. The litigation had now become open-ended, i.e., the existence of an actual controversy was presumptively proved by the letter of February 17, 1967, and Loctite could not present evidence at any hearing to show that the effect of the letter had been dissipated.

Subsequently Loctite, by appeal brief filed on or about July 1, 1971, disavowed the letter of February 17, 1967. The Court of Appeals, however, affirmed the Order from which appeal was taken without opinion, thus condemning Loctite to perpetual litigation, since the effect was to render any disavowal of the letter nugatory and permanently prevent Loctite from obtaining a hearing at which it could show that the 1967 letter was of no force and effect due to the passage of time. A petition for rehearing and rehearing en banc on the basis that the Court of Appeals overlooked *Golden v. Zwickler,* 394 U.S. 103 (1969), which is directly in point, was denied by the Court of Appeals (15a to 16a), again without comment.

2. Background of the Petition.

The first declaratory judgment action brought by respondent terminated in a consent judgment entered February 15, 1967 in which Broadview acknowledged that Loctite's patents were valid and had been infringed by it. Subsequently, Broadview was found in contempt of Court for its manufacture and sale of still other anaerobic sealants, which decision was finalized by a decision of the Court of Appeals for the Second Circuit entitled *Broadview Chemical Corporation* v. *Loctite Corporation*, 406 F.2d 538 (2d Cir. 1969); cert. denied 394 U.S. 967 (1969). A Decision on Form of Injunction (18a to 20a) issued on May 10, 1969, and the controversy between Broadview and Loctite should have been at an end.

On April 24, 1969, however, Broadview had instituted still another declaratory judgment action asking the District Court to adjudge that two of Loctite's patents were not infringed by Broadview's manufacture, use and sale of still another line of anaerobic sealants, 86 in number, which Broadview identified by the letters KBK. To that complaint, identified in the District Court as Civil Action No. 13,104, and annexed as its sole basis for meeting the "actual controversy" requirement of 28 U.S.C. §§ 2201, 2202, the Declaratory Judgment Act, was the letter dated February 17, 1967, from Robert H. Krieble, president of Loctite, to Loctite distributors (9a to 10a). After the District Court dismissed the declaratory judgment complaint in a ruling unofficially reported at 162 U.S.P.Q. 366 (D.Conn. 1969), the Court of Appeals reversed at 417 F.2d 998 (2d Cir. 1969) and this Court denied certiorari at 397 U.S. 1064 (1970).

On remand the District Court was faced not with the complaint of April 24, 1969, but with the "amend-

ed" complaint for the first time directed to Manaka compositions. Again Loctite moved to dismiss, but in a Ruling on Defendant's Motion to Dismiss Amended Complaint (11a to 13a) the district judge said, "Loctite offered no evidence that the passage of time had any effect on the existence of a controversy . . ." Yet when Loctite noticed depositions and sought a hearing to show such effect, it was denied that right, preserving the 1967 letter *in perpetuum* as a basis for meeting the "actual controversy" requirement of the Declaratory Judgment Act.

REASONS FOR GRANTING THE WRIT

1. The Decision of the Court of Appeals Is in Direct Conflict With the Decision of This Court in Golden v. Zwickler and With the Court of Appeals for the Ninth Circuit That Has Followed Golden v. Zwickler.

Since the Court of Appeals effectively denied Loctite the right to a hearing at which Loctite could contest the presence of an actual controversy necessary to sustain declaratory judgment jurisdiction, the only theory under which it could possibly have been acting was that Loctite had already had its day in court in 1969 when it contested the original action as to the KBK compositions and the Manaka compositions of the "amended" complaint were not yet in existence. This presumption is based on the belief that the Court of Appeals would not dogmatically deny Loctite a hearing however incorrect it believed Loctite's position to be. If such was the reasoning of the lower court in denying petitioner a hearing, it is in direct conflict with the rule of this Court as stated in *Golden* v. *Zwickler,* 394 U.S. 103, 108 (1969):

> "The District Court erred in holding that Zwickler was entitled to declaratory relief if the

> elements essential to that relief existed '[w]hen this action was initiated.' The proper inquiry was whether a 'controversy' requisite to relief under the Declaratory Judgment Act existed at the time of the hearing on the remand. We now undertake that inquiry."

Not only did the Second Circuit fail to follow this Court's decision in *Golden* v. *Zwickler*, but it rendered a decision in conflict with the Court of Appeals for the Ninth Circuit, which perforce followed *Golden* v. *Zwickler*. That Court, in *Sellers* v. *Regents of University of California*, 432 F.2d 492 (9th Cir. 1970), stated at page 499:

> "The 'controversy' must exist at the time of the hearing as to the availability of declaratory relief and that determination is entirely independent of any controversy that may have existed in the past."

There is no question but that petitioner was entitled to a determination of whether the controversy requisite to the relief under the Declaratory Judgment Act existed and that the time for such determination was at the time of the hearing, not several years before.

2. The Decision of the Court of Appeals Is Directly Violative of Loctite's Right to Due Process of Law.

If the Court of Appeals was not in disregard of *Golden* v. *Zwickler* but merely refused Loctite a hearing, on oral argument or submission of papers, with respect to Loctite's contention that there was no actual controversy, such refusal would be so contrary to the inchoate principles of English and American jurisprudence as to warrant exercise of the power of supervision of the Supreme Court. In a recent state-

ment of this Court in *Goldberg* v. *Kelly,* 397 U.S. 254 (1970), at page 267, this Court said:

> " 'The fundamental requisite of due process of law is the opportunity to be heard.' Grannis v. Ordean, 234 U.S. 385, 394, 34 S.Ct. 779, 783, 58 L.Ed. 1363 (1914). The hearing must be 'at a meaningful time and in a meaningful manner.' Armstrong v. Manzo, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed. 2d 62 (1965)."

In a more historical setting, Daniel Webster's argument in *Trustees of Dartmouth College* v. *Woodward,* 4 Wheat. 518, 581 (1819), defined due process as "a law, which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial."

In 1873 in *Galpin* v. *Page;* 18 Wall. 350, 368, this Court said:

> "It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant, until he has been duly cited to appear, and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered."

That one may not be deprived of his right to liberty or property without due process of law was iterated as recently as *Boddie* v. *Connecticut,* 401 U.S. 371 (1971). It is inconceivable that the Second Circuit would have utilized the absence of a written opinion to deny petitioner its basic right to contest the existence of an actual controversy as it was once again hauled into court on the tumbrel of the Declaratory

Judgment Act. Yet that is precisely what has happened, and the journey can apparently be repeated *ad nauseum* since Loctite, according to the Second Circuit, can never revoke and never challenge the letter of February 17, 1967, which stands as a perpetual monument to unending litigation. Petitioner's right to due process has been negated, for the past and the future, without a word of explanation or condolence.

CONCLUSION

Because of the failure of the Second Circuit to accord petitioner due process or to follow *Golden* v. *Zwickler,* the case should be remanded with instructions that the district court hold a hearing in accordance with *Golden* v. *Zwickler,* at which hearing the existence of an actual controversy will be determined. Petitioner also prays for a stay of further proceedings in this action until a hearing has been held and determined, since a stay pending the filing of this petition was denied by the Court of Appeals. (16a)

Respectfully submitted,

WALTER D. AMES
JAMES H. MARSH, JR.
Attorneys for Petitioner,
Loctite Corporation
WATSON, COLE, GRINDLE & WATSON
815 Fifteenth Street, N.W.
Washington, D. C. 20005

Of Counsel:

J. RODNEY RECK

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixteenth day of September one thousand nine hundred and seventy-one.

Present:

Hon. Leonard P. Moore,
Hon. J. Joseph Smith,
Hon. Paul R. Hays,
Circuit Judges.

Broadview Chemical Corporation,
Plaintiff-Appellee,

v.

Loctite Corporation, *Defendant-Appellant.*

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs to be taxed against the appellant.

A. Daniel Fusaro,
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

Civil Action No. 13104

BROADVIEW CHEMICAL CORPORATION, *Plaintiff*,

v.

LOCTITE CORPORATION, *Defendant*

Order

This declaratory judgment action is now almost two years old. Its history is one of almost continuous application by counsel to this court for resolution of the innumerable disputes which have arisen in the course of preparation of the case for trial. The present difficulty before the court is Broadview's dissatisfaction with the pace at which Loctite is evaluating Broadview's anaerobic sealant compositions, which are the subject matter of the suit, to determine whether or not they infringe Loctite's patents. Loctite has had samples of Broadview's compositions for several months, during which time it has presented the court with a variety of reasons for its failure to date to complete the tests necessary for infringement evaluation.

On March 2, 1971, the court ordered Loctite to begin submitting weekly reports on the progress of its evaluation. Since then, Loctite has submitted one report covering the months of January and February 1971 and another for the first two weeks in March. In the first report, Loctite estimates that its tests on the first series of Broadview formulae (the KBK series) will not be completed before June 4, 1971.

Loctite enjoys a dominant position in the anaerobic sealant market. Obviously, each day's delay in evaluating Broadview's compositions inures to the benefit of Loctite and the detriment of Broadview. Loctite's responses to

inquiries into the reasons for the delay appear to the court to be in large part dilatorily motivated. Accordingly, the court considers it now appropriate to fashion relief in favor of Broadview to protect it against the consequences of Loctite's further delay.

Broadview has suggested a number of avenues of relief. Its latest suggestion is that the injunction entered against it on May 10, 1969, by this court be suspended until the court decides the infringement issues presented by this case. The injunction restrained Broadview and those in active concert with it from infringing three of Loctite's patents and from selling or using specific compositions whose sale and use had already been found to have violated the terms of a prior consent decree between the parties. *See Broadview Chem. Corp.* v. *Loctite Corp.*, 406 F.2d 538 (2d Cir.), *cert. denied*, 394 U.S. 967 (1969).

The court does not view wholesale suspension of the injunction as a suitable remedy. Loctite's dilatoriness at this stage of the proceedings does not mitigate Broadview's earlier conduct which resulted in a finding of civil contempt and an extensive award of damages in addition to the injunction sought to be suspended. Nevertheless, some of the sting can be taken out of the injunction order without destroying its efficacity. The order now provides for a penalty of $2,000.00 for each violation of the injunction or consent decree. Eliminating the "*in terrorem* effect," *Broadview Chem. Corp.* v. *Loctite Corp.*, 417 F.2d 998, 1001 (2d Cir. 1969), *cert. denied*, 397 U.S. 1064 (1970), of the penalty provision may make it less risky for Broadview to begin the manufacture and sale of compositions which in its judgment do not infringe and may give Loctite additional incentive to quickly complete its infringement evaluation. Of course, if Broadview is wrong about the noninfringement of its compositions, it might still be subject, in the appropriate case, to sanctions for violation of the injunction.

Accordingly, it is the order of the court that the penalty provision of the injunction entered in this case on May 10, 1969, be, and it hereby is, suspended until resolution by this court of the infringement issues raised by this declaratory judgment action. The court will continue to be concerned with Loctite's progress toward infringement evaluation and will entertain further applications for relief if that progress should be unsatisfactory.

So Ordered.

Dated at Hartford, Connecticut, this 24th day of March, 1971.

.....

M. Joseph Blumenfeld
United States
District Judge

[Caption omitted]

Amended Complaint

Plaintiff, Broadview Chemical Corporation, hereby complains of the defendant, Loctite Corporation, and alleges as follows:

1. The plaintiff, Broadview Chemical Corporation, is an Illinois Corporation having its principal office and place of business at 2910 South 18th Avenue, Broadview, Illinois.

2. The defendant, Loctite Corporation, is a Connecticut Corporation having an office and place of business at 705 North Mountain Road, Newington, Connecticut.

3. This action is instituted under 28 U.S.C. § 2201 for a declaratory judgment of noninfringement of United States Letters Patents Nos. 2,895,950, 3,043,820, and 3,046,262, which patents are owned by the defendant, and have pre-

viously been before this Court in Civil Action No. 10713, terminated by a Consent Decree. Federal jurisdiction is invoked under 28 U.S.C. § 1338(a), and venue lies in this district under 28 U.S.C. § 1391(c).

4. An actual controversy exists between the parties in that the defendant, LOCTITE CORPORATION, has asserted that compositions covered by their patents include elements that are essential to the workability of an anaerobic sealant composition, and that any workable product must therefore be dominated by these patents. This allegation was made in a letter dated February 17, 1967, and addressed to Loctite Distributors (a copy of this letter is attached to the original Complaint in this action as Annex A).

5. The plaintiff, BROADVIEW CHEMICAL CORPORATION, has developed two new series of anaerobic sealant compositions, prepared in accordance with Broadview's KBK and Manaka formulations. Broadview has made and sold compositions prepared in accordance with the KBK formulations, and has the immediate intention and ability to make and sell compositions prepared in accordance with the KBK and Manaka formulations. A copy of the KBK formulations, together with sample compositions prepared in accordance with the KBK formulations, has previously been deposited with this Court. A copy of the Manaka formulations will be submitted to defendant and to this Court as soon as a suitable protective order is obtained from this Court.

6. Plaintiff's manufacture and sale of compositions made in accordance with the KBK and Manaka formulations does not and will not constitute an infringement of United States Letter Patent No. 2,895,950 for the following reasons:

(a) Compositions made in accordance with the KBK formulations do not contain a hydroperoxide within the scope of U.S. Patent No. 2,895,950.

(b) Compositions made in accordance with the Manaka formulations do not contain a hydroperoxide.

(c) The monomer employed in the preparation of compositions in accordance with the Manaka formulations is not covered by U.S. Patent No. 2,895,950.

7. Plaintiff's manufacture and sale of compositions made in acordance with the KBK and Manaka formulations does not and will not constitute an infringement of United States Patent No. 3,043,820 for the following reasons:

(a) No quinones are listed as an element of either the KBK or the Manaka formulations.

(b) No quinones are used in the manufacture of compositions made in accordance with either the KBK or the Manaka formulations.

(c) None of the components of compositions made in accordance with either the KBK or the Manaka formulations undergoes a chemical conversion to form a quinone.

(d) The compositions made in accordance with both the KBK and the Manaka formulations are free from quinones.

(e) The monomer employed in the Manaka formulations is not covered by U.S. Patent No. 3,043,820.

(f) Neither hydrogen peroxide nor an organic hydroperoxide is present in the Manaka formulations.

8. Plaintiff's manufacture and sale of compositions in accordance with the KBK and Manaka formulations does not and will not constitute an infringement of United States Patent No. 3,046,262 for the following reasons:

(a) No sulfimides are listed as an element of either the KBK or the Manaka formulations.

(b) No sulfimides are used in the manufacture of compositions in accordance with either the KBK or the Manaka formulations.

(c) The compositions made in accordance with both the KBK and the Manaka formulations are free from sulfimides.

(d) The monomer employed in the Manaka formulations is not covered by U.S. Patent No. 3,046,262.

(e) Neither hydrogen peroxide nor an organic hydroperoxide is present in the Manaka formulations.

9. Plaintiff does not now make, use, or sell any compositions made in accordance with formulations CP-1 through CP-7 or any other compositions (a) that infringe any of United States Patents Nos. 2,895,950, 3,043,820, or 3,046,262 and/or (b) that are in violation of the Consent Decree entered by this Court on or about February 14, 1967. Furthermore, at the time the original Complaint was filed, Broadview had destroyed all of the CP formulations in its possession.

WHEREFORE, PLAINTIFF PRAYS:

A. That this Court enter a judgment that U.S. Patents Nos. 2,895,950, 3,043,820 and 3,046,262 are not infringed by plaintiff's manufacture or sale or causing to be manufactured or sold anaerobic sealants made in accordance with either Broadview's KBK or Manaka formulations.

B. That this Court enjoin the defendant from asserting or alleging that United States Patents Nos. 2,895,950, 3,043,820, and 3,046,262 have been or are infringed by plaintiff or its customers, representatives and/or distributors, by reason of the manufacture, use, or sale of compositions in accordance with Broadview's KBK or Manaka formulations.

C. That this Court find and declare that plaintiff and its customers, representatives and distributors are not liable for damages to defendant because of plaintiff's manufacture and/or sale to such customers, representatives or distributors of Broadview's KBK or Manaka formulations.

D. That this Court find that the plaintiff and its customers, representatives, and distributors are not in violation of the Consent Decree entered by this Court on or about February 14, 1967, by reason of the manufacture, use, or sale of Broadview's KBK or Manaka formulations.

E. That the plaintiff receive such other and further relief as may be just and proper, including costs and reasonable attorneys' fees.

BROADVIEW CHEMICAL CORPORATION

By WILLIAM J. DOYLE (ROS)
William J. Doyle

A member of the Firm of
WIGGIN & DANA
205 Church Street
New Haven, Connecticut

Attorneys for plaintiff,
Broadview Chemical Corporation

Of Counsel:

GRANGER COOK, JR.
DAVID A. ANDERSON

HUME, CLEMENT, HUME & LEE
One First National Plaza
Chicago, Illinois 60670
(312) 726-4848

WIGGIN & DANA
P.O. Box 1832
New Haven, Connecticut 06508
(203) 787-4261

(Attached to Original Complaint and Incorporated by Reference in Amended Complaint)

LOCTITE CORPORATION
formerly American Sealants Company

IDP #87
February 17, 1967

To: Loctite Distributors
FROM: Robert H. Krieble
SUBJECT: Settlement of Patent Litigation

The successful defense of the Loctite patents has at last been achieved through the issuance of a court decree, a copy of which is attached.

The decree makes four major points:

1. That Loctite's patents are good and valid at law.
2. That Broadview Chemical Co. (Sta-Lok) did infringe those patents.
3. That Broadview and its agents are forbidden from further infringement.
4. That Broadview has made a monetary payment to Loctite.

Three years ago when Broadview approached some of you to take on the Sta-Lok line, they made statements regarding their lack of infringement and questioned the validity of Loctite patents. The decree provides an effective rebuttal to those statements. Unfortunately some reputable distributors were misled and now may find themselves with stocks of merchandise on their shelves which they may not legally sell. It is hard to see how they can avoid damage to either their pocketbooks or their reputations.

While Broadview can no longer contest the validity of our patents, this is not necessarily the end of the matter. They may add ingredients to their formula, claim it to be a

"new improved" product, say once again it does not infringe and force us again into recourse to the courts. Eventually, we trust, due process of law will catch up with those who manufacture, sell or use infringing products.

Aside from the legal aspects of this situation, there is the matter of product performance. During pre-trial testimony we obtained detailed formulae upon which a patent was granted a year ago to two chemists who, working part-time after the hours of their full-time jobs with other companies, make up the chemical staff of Broadview. To our knowledge, Broadview has never marketed a product relying on the claimed invention of that patent and we think we know why. Our tests have shown those formulae do not harden in the joint . . . unless there are present certain fundamental ingredients which are covered by Loctite patents. We continue to monitor their production and have yet to find a sample without infringing ingredients. We believe our composition patents include the elements which are essential to the anaerobic (self-hardening in the absence of air) cure and that any workable product must therefore be dominated by these patents. In accepting substitutes, the user runs the risk of buying a product which will be unstable, uncurable or illegal.

In order to maintain the value of your Loctite franchise we have willingly spent a lot of money . . . more in fact than we received from Broadview in a settlement based on a percentage of their stated sales volume. We thank you for your loyalty and support during these many months. The combination of sound patent structure plus aggressive marketing by staunch distributors is a good base upon which to grow a still better future.

/s/ R. H. KRIEBLE
Robert H. Krieble
President

dh
Enc: consent decree

[Caption omitted]

Ruling on Defendant's Motion To Dismiss Amended Complaint

In this episode of the continuing saga of litigation between these parties, see *e.g. Broadview Chem. Corp.* v. *Loctite Corp.*, 406 F.2d 538 (2d Cir.), *cert. denied*, 394 U.S. 976 (1969), defendant Loctite seeks dismissal of Broadview's amended complaint asking declaratory and injunctive relief. The original complaint, having already survived the full gamut of federal judicial scrutiny, *Broadview Chem. Corp.* v. *Loctite Corp.*, 417 F.2d 998 (1969), *cert. denied*, 397 U.S. 1064 (1970), sought a declaration that certain of Broadview's formulae for anaerobic sealants, designated the KBK series, did not infringe two of Loctite's patents. The amended complaint seeks a declaration that the formulae in the KBK series do not infringe a third Loctite patent, not included in the original complaint, and also that an entirely new series of formulae, designated the Manaka series, does not infringe any of the three patents.

The grounds asserted for the motion to dismiss are (1) that the amended complaint is procedurally inadmissible, and (2) that there is no actual controversy between the parties to satisfy the requirements of the Declaratory Judgment Act, 28 U.S.C. § 2201. For the reasons hereinafter expressed, the motion to dismiss the amended complaint is denied.

Broadview contends that its amendment may be filed as a matter of right under Fed.R.Civ.P. 15(a), because no responsive pleading has yet been made to the original complaint. While conceding, as it must, that the prior motion to dismiss the original complaint is not a responsive pleading, *Christophides* v. *Poreo*, 289 F.Supp. 403, 408 (S.D.N.Y. 1968), Loctite contends that the proffered amendment is in reality a supplemental complaint under Fed.R.Civ.P. 15(d), allowable only upon leave of court. Broadview does not claim that its Manaka formulations were completed prior to the original complaint. Technically, therefore, the new

complaint must be considered supplemental rather than amendatory. The distinction in this context, however, is immaterial. *See United States ex rel. Atkins v. Reiten*, 313 F.2d 673, 674 (9th Cir. 1963); *United States v. Russell*, 241 F.2d 879, 882 (1st Cir. 1957). *See generally* 1A Barron & Holtzoff, Federal Practice and Procedure § 455.

Broadview's new complaint seeks the same kind of relief sought by the original. No prejudice results to the defendant from having the infringement vel non of these extra formulae litigated in the same action. Surely Broadview could institute a new declaratory action to test these formulations by simply paying the additional filing fee for a new action. However, since the original action has barely begun, defendant not even as yet having filed an answer, no reason appears why all the formulations should not be considered at once. No prejudice having been shown, in the interest of expediency to the parties and judicial economy, leave is hereby granted Broadview to file its supplemental complaint.

Loctite next contends that no actual controversy exists between the parties. That same claim was made with respect to the KBK formulations in the original complaint. This court then found sufficient controversy for a declaratory judgment action but declined to exercise its discretion to entertain the action. The Court of Appeals agreed that sufficient controversy existed and, exercising its discretion de novo, ordered this court to entertain the action. 417 F. 2d 998 (1969). The considerations relied upon by the Court of Appeals in the case of the KBK formulations apply equally to the Manaka formulae. The only difference is the passage of approximately one year's time between that ruling and this motion. Loctite offered no evidence that the passage of time had any effect on either the existence of a controversy or the propriety of exercising discretion to entertain the case. In the absence of any such evidence, this court is bound by the Court of Appeals' earlier ruling.

Accordingly, the motion to dismiss the supplemental complaint, erroneously labled "amended complaint" is denied.

So Ordered.

Dated at Hartford, Connecticut, this 23rd day of September, 1970.

/s/ M. Joseph Blumenfeld
M. Joseph Blumenfeld
United States District Judge

[Caption omitted]

Notice of Taking Depositions

To plaintiff above-named and its counsel:

Please Take Notice that on the 12th day of January, 1971, beginning at 11:00 o'clock in the morning of that day and continuing thereafter from day to day until said deposition has been completed or adjourned, defendant, Loctite Corporation, will take the testimony on oral examination of:

Fred Jenkins

The examination will be taken at offices of Wilcox-Sliders, Inc., 344 Mulberry Street, Newark, New Jersey 07102, before a Notary Public or some other duly authorized officer. Your legal representatives are invited to attend and take such part in the proceedings as may be proper.

Robert J. Lasker
Robert J. Lasker

Watson, Cole, Grindle & Watson
815 Fifteenth Street, N. W.
Washington, D. C. 20005
Of Counsel for Defendant

Attorney of Record:

J. Rodney Reck
705 North Mountain Road
Newington, Connecticut 06111

[Caption omitted]

Oral Decision Excerpted From Transcript of Proceedings—1/25/71

The Court: . . .

[11] So on that basis I will grant the plaintiff's motion for a protective order, considering that the purpose of the depositions is to show that there is no basis for jurisdiction because the threat in those letters has evaporated.

6/1/71 71-1441

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the first day of June, one thousand nine hundred and seventy-one.

No. 71-1441

BROADVIEW CHEMICAL CORPORATION, *Plaintiff-Appellee,*

v.

LOCTITE CORPORATION, *Defendant-Appellant.*

It is hereby ordered that the motion made herein by counsel for the appellee, Broadview Chemical Corporation, to dismiss the appeal of the Loctite Corporation from the United States District Court for the District of Connecticut for lack of jurisdiction be and it hereby is denied.

It is further ordered that appellant shall file its brief and joint appendix on or before July 1, 1971 and that the appellee shall file its brief on or before August 2, 1971.

It is further ordered that argument of the appeal shall be heard during the week of September 13, 1971.

A. DANIEL FUSARO
Clerk

BEFORE:

HON. TOM C. CLARK
Associate Justice

HON. J. JOSEPH SMITH
Circuit Judge

HON. JOSEPH C. ZAVATT
District Judge

71-1441

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

BROADVIEW CHEMICAL CORPORATION, *Plaintiff-Appellee,*

v.

LOCTITE CORPORATION, *Defendant-Appellant.*

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is Denied.

J. JOSEPH SMITH
J. Joseph Smith
LEONARD P. MOORE
Leonard P. Moore
PAUL R. HAYS
Paul R. Hays
Circuit Judges

October 13, 1971.

71-1441

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

BROADVIEW CHEMICAL CORPORATION, *Plaintiff-Appellee,*

v.

LOCTITE CORPORATION, *Defendant-Appellant.*

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant and no active circuit judge having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

HENRY J. FRIENDLY,
Chief Judge

October 13, 1971.

71-1441

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the ..... day of October, one thousand nine hundred and seventy-one.

BROADVIEW CHEMICAL CORPORATION, *Plaintiff-Appellee,*

v.

LOCTITE CORPORATION, *Defendant-Appellant.*

It is hereby ordered that the motion made herein by counsel for the appellant to recall the mandate and stay its reissuance pending application to the Supreme Court of the

United States for a writ of certiorari be and it hereby is denied.

LEONARD P. MOORE
J. JOSEPH SMITH
PAUL R. HAYS
Circuit Judges.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 5th day of November, one thousand nine hundred and seventy-one.

BROADVIEW CHEMICAL CORPORATION, *Plaintiff-Appellee*,

v.

LOCTITE CORPORATION, *Defendant-Appellant*.

It is hereby ordered that the motion made herein by counsel for the appellant to stay the execution of the mandate for a period of thirty days pending application to the Supreme Court of the United States for a writ of certiorari pursuant to Rule 41(b), Federal Rules of Appellate Procedure, be and it hereby is denied.

LEONARD P. MOORE
Leonard P. Moore
J. JOSEPH SMITH
J. Joseph Smith
PAUL R. HAYS
Paul R. Hays
Circuit Judges

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Civil No. 10,713

BROADVIEW CHEMICAL CORPORATION

v.

LOCTITE CORPORATION

Decision on Form of Injunction

After a hearing on a motion by the defendant to punish the plaintiff for violation of a consent decree theretofore entered in this case, the court concluded that the contempt charges had been proved and ordered that an injunction should be entered. Proposed forms of an injunction were submitted to the clerk, but no formal order was entered. Pending a hearing on the form of the order, an appeal was taken. The mandate of the Court of Appeals requires that this court's order be modified to exclude from its prohibition the plaintiff's use of formulations CP-8 and CP-9. *Broadview Chem. Corp.* v. *Loctite Corp.*, 406 F.2d 538 (2d Cir. 1969). The plaintiff's petition to the Supreme Court for a writ of certiorari having been denied, 37 U.S.L.W. 3395 (Apr. 22, 1969), the parties appeared before this court on May 2, 1969, and were heard on the form of the injunction to be issued, pursuant to the mandate of the Court of Appeals.

The parties are in dispute only as to the proper reach of the injunction. The defendant claims that it should conform to the usual form, as set out in Fed.R.Civ.P. 65(d) to run against the plaintiff, its "officers, agents, servants, employees and attorneys, [and those persons in active concert or participation with them who receive actual notice of this order by personal service or otherwise]." The plaintiff makes the claim that the portion in brackets should be omitted, and that in lieu thereof a specific limitation should be added, to wit: "This injunction shall not extend

to Broadview's customers, distributors, manufacturers' representatives, or to their respective customers." That claim is rejected.

The rule is that anyone who knowingly helps to bring about what the plaintiff is enjoined from doing ought to be liable. In *Alemite Mfg. Corp.* v. *Staff*, 42 F.2d 832, 833 (2d Cir. 1930), Learned Hand, Circuit Judge, said that this means that anyone not a party "must either abet the defendant, or must be legally identified with him" before he may be held to violate the decree. What consequences will result in the future if Broadview's customers, distributors, manufacturers' representatives, or their respective customers, knowingly commit the forbidden acts must await the day a charge against them is brought. They ought not to be given immunity in advance.

Accordingly, a decree in the following words shall be entered:

INJUNCTION

1. Broadview Chemical Corporation, the above-identified plaintiff, its officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them who receive actual notice of this injunction by personal service or otherwise, are hereby enjoined from infringement of United States Letters Patent Nos. 2,895,950; 3,043,820; and 3,046,262, and specifically from the sale or use of compositions identified as Sta-Lok 500 and Sta-Lok 800 and other compositions formulated according to formulae CP-1 to CP-7, inclusive, identified in the above-entitled action; and they are enjoined from further violation of the Consent Decree entered February 15, 1967, in this action.

2. For each violation of this injunction or the Consent Decree entered February 15, 1967, the violating persons shall each pay to Loctite Corporation the amount of Two Thousand Dollars ($2,000.00).

Before a final judgment can be entered a determination must be made of the damages suffered by the defendant, its prosecution expenses, and costs. The parties have undertaken steps to resolve these matters—amicably, if possible. There is no reason why the injunction should not issue now. A final judgment will be entered on the issues which have been fully litigated and as to which decisions have already been filed as soon as the amount to be awarded is determined.

So Ordered

Dated at Hartford, Connecticut, this 9th day of May, 1969.

.....

M. Joseph Blumenfeld
United States District Judge

Supreme Court, U.S.
FILED
JAN 6 1972
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

October Term, 1971

No. 71-743

LOCTITE CORPORATION,
Petitioner,

vs.

BROADVIEW CHEMICAL CORPORATION,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

GRANGER COOK, JR.
DAVID A. ANDERSON

HUME, CLEMENT, HUME & LEE, LTD.
One First National Plaza
Suite 5150
Chicago, Illinois 60670

Attorneys for Respondent

CONTENTS

	PAGE
INTRODUCTION	1
PETITIONER'S QUESTIONS PRESENTED	2
SUPPLEMENTAL STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	3
A. There is No Conflict in the Circuits	3
B. There was No Denial of Due Process to Petitioner	4
CONCLUSION	5

TABLE OF CASES

Sellers v. *Regents of University of California*, 432 F.2d 493 (9th Cir. 1970)	4
Golden v. *Zwickler*, 394 U.S. 103 (1969)	4

IN THE

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Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

Respondent respectfully requests this Court to deny Petitioner's Petition for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Second Circuit entered on September 16, 1971, in its Cause No. 71-1441.

PETITIONER'S QUESTIONS PRESENTED

Respondent denies that this case presents any question that merits the attention of this Court and, further, submits that petitioner's "Questions Presented for Review" should more properly be stated as follows:

1. In view of the Court of Appeals extensive review of the "controversy" between the parties and its conclusion that petitioner's "threatening" letter to its own representatives did not merit further inquiry, was not petitioner accorded due process of law?

2. Since the Court of Appeals held "there *is* a justiciable controversy" at the oral argument, was not such action consistent with (not in conflict with) the requirement of the Supreme Court and the Ninth Circuit Court of Appeals that a "controversy" must "exist at the hearing"?

SUPPLEMENTAL STATEMENT OF THE CASE

Petitioner's recital of the "facts" is in many respects accurate, but in many respects is subjective, argumentative, and incomplete. Therefore, respondent submits the following supplemental statement of fact:

In their briefs and at the oral argument, the parties differed on the "issue" on appeal. Petitioner contended, in essence, that jurisdiction over the Manaka compositions was in issue. Respondent contended, on the other hand, that the sole issue was whether the trial court abused its discretion in temporarily suspending the $2,000.00 infringement penalties because of petitioner's deliberate delay in taking an infringement position in the present action.

During the hearing before the Court of Appeals, petitioner outlined the history of litigation between the parties and, as it had done in its brief, petitioner again renounced the "threatening" letter of February 17, 1967 from peti-

tioner's President to its representatives. Petitioner repeated the arguments made in its brief and urged, in essence, that depositions of respondent's customers was needed to attack jurisdiction over respondent's Manaka compositions.[1]

In addition to arguing that the trial court had not abused its discretion, respondent emphasized the factual controversy *between the parties*. Respondent referred to the Consent Decree of 1967, the Contempt Decision of 1968, the Injunction of 1969 (including the $2,000.00 penalties for each infringement by each officer, director, employee, attorney, etc.), and the aggressive and protracted litigation between the parties (which is too extensive to reproduce for the Court).

At the conclusion of the oral argument, the Court of Appeals ruled from the bench:[2] "We agree with you, Mr. Ames [counsel for petitioner], the jurisdictional issue is before us on this appeal. We find that there *is* a justiciable controversy and affirm the District Court Order . . ." (emphasis added).[3]

REASONS FOR DENYING THE WRIT

A. There is No Conflict in the Courts.

Petitioner alleges that "the only theory" underlying the Court of Appeal's affirmance was that petitioner "had

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[1] This question was resolved by the Court of Appeals adversely to petitioner in the dismissal of an earlier appeal No. 71-1339.

[2] This quote is almost verbatim and is reproduced word for word from respondent's counsel's notes made within minutes after the Court's ruling.

[3] Petitioner filed before the Court of Appeals a "Petition for Rehearing and Rehearing En Banc" and made the same arguments to the Court of Appeals as it now makes to this Court. The Petitions were separately denied by the Court of Appeals.

already had its day in Court in 1969 when it contested the original action as to the KBK compositions . . ." After setting up this "straw man," petitioner then argues that this theoretical action of the Court of Appeals is in conflict with the Court of Appeals in *Sellers* v. *Regents of University of California*, 432 F.2d 493 (9th Cir. 1970), which held that "the 'controversy' must exist at the time of the hearing."

The truth is that the "straw man" is the product of petitioner's imagination and is inconsistent with the facts. Actually, the Court of Appeals specifically considered the pertinent facts in existence *at the time of the hearing*. It then flatly ruled "there *is* a justiciable controversy" involving the Manaka compositions. Thus, the Court of Appeals below acted consistently with (not in conflict with) the Ninth Circuit Court of Appeals and the Supreme Court.[1]

B. There Was No Denial of Due Process to Petitioner.

As a losing litigant before the District Court and the Court of Appeals, petitioner resorts to its "denial of due process" argument. This argument on its face is totally without merit.

As pointed out above, the Court of Appeals extensively reviewed the "controversy" *between the parties* as it existed at the time of the hearing. Specifically, the Court of Appeals considered the facts, as they related to petitioner and respondent, to adequately establish a "controversy" so as to provide jurisdiction over the Manaka compositions. It properly concluded that any attitude or state of mind of petitioner's representatives (to which the 1967 letter was addressed) or of respondent's customers was irrelevant

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[1] See *Golden* v. *Zwickler*, 394 U.S. 103 (1969).

and/or moot. As such, Petitioner's desire to explore through depositions the attitude or state of mind of these representatives or customers was likewise irrelevant and/or moot.

The important point is the Court of Appeals evaluated the factual relationship between petitioner and respondent and, *on this basis alone,* properly concluded that "there is a justiciable controversy" over the Manaka compositions.

CONCLUSION

The Petition for Certiorari does not raise any questions that are appropriate for review by the Supreme Court. The alleged conflict in the circuits and with a decision of this Court does not exist. The alleged denial of due process is contrived and is void of any merit. Accordingly, it is respectfully submitted that the Petition should be denied.

Respectfully submitted,

GRANGER COOK, JR.
DAVID A. ANDERSON

HUME, CLEMENT, HUME & LEE, LTD.
One First National Plaza
Suite 5150
Chicago, Illinois 60670

Attorneys for Respondent

CERTIFICATE OF SERVICE

It is hereby certified that on January 5, 1972, one copy of this Brief was mailed, first class; postage prepaid to: Walter D. Ames, Esq., Watson, Cole, Grindle & Watson, 815 Fifteenth Street N.W. Washington, D.C. 20005, J. Rodney Reek, Esq., Loctite Corporation, North Mountain Road, Newington, Connecticut 06111, and Ralph C. Dixon, Esq., Day, Berry & Howard, One Constitution Place, Hartford, Connecticut 06103.

Granger Cook, Jr.

SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
JAN 13 1972
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-743

LOCTITE CORPORATION, *Petitioner,*

v.

BROADVIEW CHEMICAL CORPORATION, *Respondent.*

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

WALTER D. AMES
JAMES H. MARSH, JR.
Attorneys for Petitioner,
Loctite Corporation
WATSON, COLE, GRINDLE & WATSON
815 Fifteenth Street, N.W.
Washington, D. C. 20005

Of Counsel:

J. RODNEY RECK

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-743

LOCTITE CORPORATION, *Petitioner,*

v.

BROADVIEW CHEMICAL CORPORATION, *Respondent.*

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Briefly stated, petitioner has presented the questions whether by denying it a hearing on the existence of the actual controversy necessary to sustain a declaratory judgment action, the Second Circuit failed to follow the clear requirement of *Golden* v. *Zwickler,* 394 U.S. 103 (1969), and whether such denial violated petitioner's right to due process of law. In its brief in opposition, the only procedure that respondent even intimates approaches a hearing is the oral argument before the Court of Appeals. While petitioner never

considered any such possibility, and the Court of Appeals never made any utterance supporting that hypothesis, any such "hearing" would not provide petitioner with due process of law. As this Court said in *Goldberg* v. *Kelly,* 397 U.S. 254, 267 (1970), quoting in part *Armstrong* v. *Manzo,* 380 U.S. 545, 552 (1965):

> "The hearing must be 'at a meaningful time and in a meaningful manner.'"

Twenty minutes of oral argument before a Court of Appeals, where no witnesses can be called, no documents offered in evidence, and all of the basic attributes of trial denied, is not a meaningful hearing under *Golden* v. *Zwickler,* nor is it sufficient to satisfy due process. It is the equivalent of a criminal trial at which the accused is given a "full hearing"—but merely denied the right to offer evidence in his own behalf.

Actually, of course, there was no hearing before the Court of Appeals, which never intimated that it was conducting a *Golden* v. *Zwickler* hearing and would probably be amazed to learn that respondent has attempted to turn its hearing room into a court of primary jurisdiction.

Respondent then proceeds as though there were no denial of due process because of some mental gymnastics that it says took place in the minds of the Court of Appeals Judges. Since the Court of Appeals is not a court of record and only entered a one line affirmance, any such attempt by respondent is pure impudence.* This sort of clairvoyance will not be re-

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* The quotation on page 3 of respondent's brief that the Court of Appeals said it reached the jurisdictional issue is approximately correct.

peated here. The Second Circuit would not give a written opinion, although petitioner's counsel asked if it would not do so. On petitions for rehearing and rehearing en banc the Second Circuit avoided the clear right of petitioner to a hearing under *Golden* v. *Zwickler* by the simple expedient of never referring to it in its *pro forma* denials of the petitions. In all common justice such a procedure should not be approved by denial of the petitioner here.

To encompass respondent's imaginative theory, it is suggested that the case be remanded to the Second Circuit with instructions that it consider whether a hearing in accordance with *Golden* v. *Zwickler* and meeting the requirements of due process of law has been afforded petitioner and, if not, that it order that such a hearing be held. If, in the remote possibility that the Second Circuit, like respondent, considered oral argument before it a *Golden* v. *Zwickler* hearing satisfying due process, the Second Circuit can say so. There must be judicial adherence. To what effect is the Constitution's guarantee of due process if it can be negated by disregard?

Respectfully submitted,

WALTER D. AMES
JAMES H. MARSH, JR.
Attorneys for Petitioner,
Loctite Corporation
WATSON, COLE, GRINDLE & WATSON
815 Fifteenth Street, N.W.
Washington, D. C. 20005

Of Counsel:

J. RODNEY RECK